Supreme Court, U. S.
FILED
JAN 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1064

STATE OF LOUISIANA
(Plaintiff)

versus

KENNETH B. KAERCHER
(Defendant-Petitioner)

STATE OF LOUISIANA
(Plaintiff)

versus

THOMAS W. TIGHE
(Defendant-Petitioner)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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(Defendant-Petitioner)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Kenneth B. Kaercher and Thomas W. Tighe, your petitioners, pray that a writ of certiorari issue to review the judgment

and decision of the Supreme Court of the State of Louisiana which affirmed the denial of their motion to suppress evidence in the Seventeenth Judicial District Court, Lafourche Parish, Louisiana.

OPINIONS BELOW

SUPREME COURT OF LOUISIANA. The opinion of the Louisiana Supreme Court bears the style and citation as follows: State of Louisiana v. Kenneth B. Kaercher State of Louisiana v. Thomas W. Tighe, La. 362 So. 2d 754 (1978). A copy of the opinion is appended to this petition and made part hereof. (See Appendix A).

SEVENTEENTH JUDICIAL DISTRICT COURT, LAFOURCHE PARISH, LOUISIANA. The trial judge did not assign oral reasons or render a written judgment at the time of the ruling on the jointly tried motions to suppress. Copies of the written Judgment on Motion to Suppress in each case

are appended to this petition and made part hereof. (See Appendix B and C). Subsequently, on April 10, 1978, the trial judge caused to be filed in the record in the Louisiana Supreme Court a "Consolidated Cases - Per Curiam" which has been placed before the index of volumn one in the Louisiana Supreme Court record.

JURISDICTION

After an adverse ruling on the motion to suppress in the trial court, defendants-petitioners, with reservation of their right to appeal that issue, entered pleas of guilty, were sentenced, and appealed to the Louisiana Supreme Court. The judgment and opinion of the Court below (See Appendix A) was entered on September 5, 1978. Rehearing was denied on October 5, 1978. Upon timely motion, the Honorable Joe W. Sanders, Chief Justice of

the Supreme Court of Louisiana, on October 5, 1978, stayed all proceedings pending the filing, consideration and disposition by the Supreme Court of the United States of the petition and application for writs of certiorari herein filed. (See Appendix D).

The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code Section 1257(3).

THE QUESTIONS PRESENTED

I. Whether in terms of the Fourth Amendment requirement that a search warrant be based upon an affidavit stating probable cause for its issuance, the language "green vegetable matter" (inferentially "green matter") is synonymous with the word "marijuana".

II. Whether the statement in an affidavit that an officer saw "what appeared

to be green vegetable matter on the tailgate portion of the truck" gives probable cause to believe that the truck contains marijuana.

III. Whether exigent circumstances must exist in addition to probable cause for a warrantless search of a vehicle.

IV. Whether a prior unconstitutional warrantless search of a vehicle renders a subsequent search of the vehicle pursuant to a search warrant invalid.

V. Whether deception of the Magistrate who issued the search warrant for the vehicle by intentionally concealing from him the fact of the prior warrantless search of the vehicle constitutes prosecutorial misconduct of such a nature as to render invalid any search warrant so obtained.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Louisiana Constitution, Article 1, Section 5

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Louisiana Code of Criminal Procedure, Article 162

> A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant.
>
> A search warrant shall particularly describe the person or place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search or seizure.

STATEMENT OF THE CASE

Defendants were charged by separate Bills of Information with possession of marijuana with intent to distribute, a violation of Louisiana Revised Statutes 40:962. By consent of the parties and since both cases arose out of the same set of facts, the court joined for hearing a pre-trial motion to suppress marijuana urging that the seizure was warrantless, without consent and without the requisite exigent circumstances or, al-

ternatively, that the warrant issued was fatally defective. After the motion to suppress was denied, defendants reserved assignments of error and the trial court permitted the defendants to enter guilty pleas to the crime charged with reservation of the right to appeal the ruling on the motion to suppress, a procedure approved in State v. Crosby, 338 So. 2d 584 (La. 1976).

The Louisiana Supreme Court, in its opinion, upheld the validity of the search warrant and refused to determine the legality and constitutionality of the prior warrantless search of the vehicle in which the law enforcement officers discovered the same identical marijuana which they seized pursuant to the search warrant. State v. Kaercher and State v. Tighe, 362 So. 2d 754 (La. 1978).

On the night of April 22, 1977, and in the early morning hours of April 23, 1977, the Safari Club, a nightclub along the western side of Bayou Lafourche, burned to the ground. The fire was out except for a few hot spots which required the intermittant spraying of water from the bayou. After cars had been allowed to pass along Louisiana Highway 1 in front of the fire scene for about one hour, a blue truck driven by Thomas Tighe came through the area going north at about 45 miles per hour, the posted speed limit. Major Kenneth Doucet, the Deputy Sheriff in charge at the scene, hollered at Sargeant Cantrelle to stop the truck.

First Arrest:

At a point approximately one mile north of the scene of the fire, Deputy Cantrelle pulled the truck over to the

shoulder of Louisiana Highway 1. The driver of the truck, defendant, Thomas Tighe, and the officer dismounted. Thomas Tighe proceeded to the front left side of the officer's police vehicle. Officer Cantrelle says that he went to the front of his vehicle, parked approximately four to five feet behind the truck and observed green vegetable matter on the tailgate. The driver of the truck was asked for his driver's license which he produced. The license identified the driver as Thomas W. Tighe. Kenneth B. Kaercher was a passenger in the truck and at this time had remained in the truck. The driver was advised that he was under arrest. The officer asked for permission to open the truck and the driver replied: "Hell no, you can't". The officer was advised by his superior to obtain a search warrant.

Second Arrest:

The officer directed Thomas Tighe to drive the truck to the parking lot of the Galliano Courthouse annex. This was done and as Thomas Tighe and his passenger, Kenneth Kaercher, were being led into the police station, they were again ordered to submit to a search of their vehicle and again they refused. After reaching the annex building, the defendants, Kaercher and Tighe, were placed in a civil section of the Sheriff's office and advised by Detective Boughamer that they were arrested for reckless operation of a motor vehicle and given the Maranda warning and advice of rights. Officers obtained gleanings from the tailgate of the truck and took samples from the tailgate of the truck.

Third Arrest:

Detective Boughamer then advised the

defendants that in addition to the reckless operation, they were also charged with possession of marijuana.

First Search:

Thereafter, Major Doucet, Detective Boughamer, and Detective Lirette again returned to the parking lot and observed the tailgate of the truck. At this time, Major Doucet opened the truck to observe its contents and saw many bales of marijuana which was subsequently weighed at Valentine Sugars and determined to be 12,300 pounds.

First Seizure:

Detective Boughamer took samples from inside the truck and they field-tested as positive marijuana. The group then went back into the annex building where Deputy Lirette finished assisting Deputy

Cantrelle in preparing the affidavit for the search warrant.

Fourth Arrest, Securing of Search Warrant, and Second Search:

The officers then obtained a search warrant from Judge Wollen J. Falgout at about 5:21 o'clock a. m. The affidavit upon which the search warrant was issued is appended to this petition and made part hereof. (See appendix E) Neither the affidavit nor the officers disclosed to the judge issuing the warrant the fact that they had conducted a prior warrantless search of the vehicle and seized samples of its contents. After the officers obtained the warrant, they returned to the Galliano Courthouse annex where the two defendants were being held in custody and at approximately 7:00 a. m., with the search warrant, conducted a second search. After the truck was search-

ed with the search warrant at 7:00 a. m., the defendants were advised that they were charged with possession of marijuana with intent to distribute.

From this analysis it is readily apparent that the defendant, Thomas W. Tighe, had been arrested three times before the search of the truck or the seizure of a sample from within the contents of the truck. The charge he was arrested on initially at the time of the stopping of the truck is not entirely clear but, in any event, prior to the warrantless search and warrantless seizure of part of the contents of the truck, Thomas W. Tighe was arrested on the charge of reckless operation of a motor vehicle and possession of marijuana. He was not about to be allowed to go anywhere. The co-defendant and only other passenger of the vehicle, Kenneth Kaercher,

had also been arrested on reckless operation of a vehicle (although that it was doubtful that that is a valid arrest of a passenger) and on a charge of possession of marijuana. Similarly, he was not about to go anywhere. It was at this time and under these circumstances that the officers warrantlessly opened the truck, observed its contents, removed samples of the contents, and conducted field tests of the samples.

REASONS FOR GRANTING THE WRIT

WARRANTLESS SEARCH OF VEHICLE:

The first search was invalid in that there existed no exigent circumstances justifying a warrantless search under:

A. Federal Constitutional Standards
B. The "Automobile Exception"
C. The Louisiana Automobile Warrantless Search Doctrine

The state has confessed that the first search of the truck which was conducted by

Lt. Lirette, Capt. Boughamer, Maj. Doucet and possibly Deputy Cantrelle (see the statement of Lt. Lirette) was without benefit of a search warrant.

The warrantless search occurred at approximately 4:00 a. m. The warrant was issued at 5:21 a. m. pursuant to the application of Deputy Cantrelle.

A. Federal Constitutional Standards

The constitutional preference for a warrant has been articulated by the Supreme Court in broad and unqualified terms. Indeed, in Coolidge v. New Hampshire, 403 U. S. 443, 454-455 (1971), the court described "as the most basic constitutional rule in this area (of search and seizure)" the principle that warrantless searches are:

> "per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions."

Accord, Katz v. United States, 389 U. S. 347, 357 (1967).

The wisdom of the warrant requirement is that it

> "assures that legal inferences anc conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal investigative-enforcement process." South Dakota v. Opperman, 428 U. S. 364, 370 n. 5 (1976).

Law enforcement officers are, after all, "engaged in the often competitive enterprise of ferreting out crime" (Johnson v. United States, 333 U. S. 10, 14 (1948)) and cannot, consequently, be relied upon to achieve the precision of the neutral magistrate in sifting evidence, separating fact from suspicion, determining dispassionately whether additional investigation is necessary, and setting specific and predefined limits on the scope of the search.

In Katz v. United States, supra, the

Supreme Court specifically recognized that the agents in the case had acted "with restraint" (389 U. S. at 356) and on facts sufficient to secure a warrant had they sought to do so. Nevertheless, the Court held that this was not a sufficient substitute for a warrant itself:

> "The inescapable fact is that the restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor where they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." 389 U. S. at 356-357.

And, recently, the Supreme Court

attested to the continuing vitality of the warrant requirement in United States v. Chadwick, 97 S. Ct. 2476 (1977). In Chadwick, the government contended that the warrant requirement protects only interests traditionally identified with the home. The court however, flatly rejected such a suggestion and reaffirmed the central place which the warrant plays in the constitutional guarantee against unreasonable searches and seizures:

> "We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales. As we have noted before, the Fourth Amendment 'protects people, not places.' Katz v. United States, 389 U. S. 346, 351 (1967); more particularly, it protects people from unreason able government intrusions into their legitimate expectation of privacy.
>
> Just as the Fourth Amendment 'pro tects people, not places,' the protections a judicial warrant offers against erroneous govern mental intrusions are effective

whether applied in or out of the home.

***

A fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interest found inside the four walls of the home." 97 S. Ct. at 2481, 2482, 2483.

B. The "Automobile Exception"

In Carroll v. United States, 267 U. S. 132 (1925), the Supreme Court upheld a warrantless search of an automobile on probable cause to believe that it was in the act of transporting illegal liquor, because the court found that the risk that the vehicle could be moved out of the jurisdiction made the securing of a warrant impracticable. The "Carroll" or "automobile" exception to the warrant requirement, as it became known, was later construed by the court as follows:

"A search warrant (is) unnecessary where there is probable cause to search an automobile stopped on

the highway; the car is moveable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." Chambers v. Maroney, 399 U. S. 42, 51 (1970).

Thus, there is no per se automobile exception to the warrant requirement. Carroll and its progeny stand only for the proposition that, because of its mobility, an automobile may present an exigent circumstance which excuses the police from obtaining a warrant, and which justifies a search provided the police have probable cause. But "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Collidge v. New Hampshire, 403 U. S. 443, 461-462 (1971). See also Almeida-Sanchez v. United States, 413 U. S. 266, 269 (1973) ("The Carroll doctrine does not declare a field day for the police in searching automobiles.") Therefore, where there are no exigent circumstances,

the police are required to obtain a warrant despite the fact that the target of the search is an automobile. United States v. McCormick, 502 F. 2d 281, 287 (9th Cir. 1974). This principle is graphically illustrated by the following cases:

In United States v. Young, 489 F. 2d 914 (6th Cir. 1974), law enforcement officers conducted a warrantless search of a truck that had been parked for several days and which Young had used as a dormitory. Finding that the officers had no grounds to believe that the vehicle might be moved within the few minutes required to make application for a search warrant, the Sixth Circuit Court of Appeals found that there was no exigent circumstances justifying the failure to obtain a warrant and that, consequently, the search was illegal:

> "At times, to be sure, the fact that the challenged evidence is located in a motor vehicle may, in conjunction with other circumstances, furnish the exigencies that would permit a search to be conducted without a warrant . . . However, the fact that the object sought to be searched in a motor vehicle does not, ipso facto, create an exigency. Not every warrantless search of a motor vehicle is valid simply because probable cause may exist." 489 F. 2d at 916 (emphasis added).

And, in United States v. Payne, 424 F. 2d 169 (9th Cir. 1970), a warrantless search of a car was found invalid for similar reasons. The appellant and three companions were camping in Yosemite National Park over the Memorial Day weekend. An off-duty police officer camping nearby observed what he suspected to be marijuana smoking and other drug related activities connected to the car. Together with a Forest ranger, the officer made a warrantless search of the vehicle and found some seconal capsules which formed the basis of the charges

brought. The Ninth Circuit Court of Appeals, however, held the search unconstitutional because there were no exigent circumstances:

> "There is no indication in the record that the appellant or any of his party were preparing to leave, and quite to the contrary, it is clear that appellant was bedding down for the evening and that there was ample time to secure the necessary warrant for the search of the car ..." 424 F. 2d at 172.

Thus, probable cause alone is insufficient. United States v. Farnkoff, 535 F. 2d 661 at 665-666 (1st Cir. 1976) and the cases cited therein. The state of the law is presently that even assuming probable cause, a warrantless car search without exigent circumstances will fail. We deal at length first with the need for the exigency and the absence thereof in the case at bar. See in particular United States v. McCormick, 502 F. 2d at 287 (9th Cir.).

The United States Court of Appeals for the Second Circuit in United States v. Ellis, 461 F. 2d 962 (2nd Cir. 1972), offers a sound starting point for our analysis. To the warrant requirement there is carved out the "automobile exception" (Ellis at 966). That cars do not stand on the same footing as a home is a verity which needs no citation. However, as Mr. Justice Stewart tells us in Coolidge:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U. S. at 461-2.

So, too, the Supreme Court stated that "The Carroll doctrine does not declare a field day for the police in searching automobiles". Almeida-Sanchez v. United States, 413 U. S. 266, 269. There is no support in any case decided by the Supreme Court for the proposition for the existence of per se exigency for a warrantless search whenever an automobile is involved. The

rule is quite the contrary. See United States v. Farnkoff, 535 F. 2d 661 at 665-666.

The Second Circuit in Ellis (at 966) set forth the "automobile exception" as follows:

> "Rather, the underlying rationale of the 'automobile exception' is that exigent circumstances justify the warrantless search of an automobile when there is probable cause, where the opportunity to search is fleeting ..." Chambers v. Maroney, 399 U. S. at 51.

In Ellis, the court found exigent circumstances in these findings and conclusions: "... the opportunity to search --- was fleeting". Only one officer came upon the car. Had arrangements been made for a special police detail, "police manpower ... would have been drained" when men were needed to apprehend the car's former occupants. There was the danger to the police officers and the public generally that the robbers had left guns

in the car (at 666). There were not enough officers available to prevent the automobile from being ransacked or driven away. And, what "is significant" is that the officer "was not searching the automobile merely for evidence against suspects already in custody" (at 966). And, this is crucial to the facts of the case at bar. Thomas Tighe and Ken Kaercher were under arrest and in custody for reckless driving and possession of a small amount of marijuana. The only purpose of the search was to collect further evidence.

Can the State in the case at bar, seriously contend that the opportunity to search the blue truck was "fleeting"? Was it "not practicable to serve a warrant" as in Carroll v. United States, 267 U. S. 132 (1925)? Was the scene a dark dangerous place for a search as was found to be the case in Chambers, supra?

And can it honestly be contended that with application for a warrant already in progress and numerous law enforcement officers at the scene, the dispatch of one agent to secure a warrant would have dangerously "drained manpower" leaving the parked locked vehicle unsafe and unsecure? Unlike Chambers and Carroll, the officers in the case at bar did not stop a fleeing car in the process of a getaway at a time when they were undermanned* and there was no showing of danger to the officers or the public as in Chambers, Ellis or Cady v. Dombrowski, 413 U. S. 433 (1973).

In Chambers, a warrantless search of a car securely held in government custody was nevertheless reasonable only because

*See e.g., United States v. Bradshaw, 490 F. 2d 1097 (4th Cir. 1974)

the initial seizure had been proper due to exigent circumstances. Chambers, supra, 399 U. S. at 51-52. See note, Warrantless Searches of Automobile, 87 Harv. L. Rev. 835, 843-44 (1974); Miles and Wefing, The Automobile Search and and the Fourth Amendment - A Troubled Relationship, 4 Seton Hall L. Rev. 105, 130-132 (1972). The vehicle's potential mobility has always been the crucial factor rendering the prior procurement of a search warrant impractical. Thus, effective law enforcement requires immediate action because "the opportunity (for the) search is fleeting". Chambers, supra, at 51. But there is no per se exemption from the warrant requirement for automobiles, McCormick, supra, 502 F. 2d at 287. In the case at bar, the occupants are under arrest on the reckless operator charge and shortly afterward on the possession charge.

The "automobile exception" to the warrant requirement remains as thusly state:

> "Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Carroll v. United States, 267 U. S. 132, 153; See Brinegar v. United States, 338, U. S. 160, 395 U. S. at 964 n. 9." Chimel v. California, 395 U. S. 752 (1969)

The above was quoted with approval in Chambers, footnote at p. 50, and restated in Collidge:

> "The underlying rationale of Carroll and of all the cases which have followed it is that there is "a necessary difference between a search of a store, dwelling house, or other structure in respect to which a proper official warrant readily may be obtained and a search of a ship, motorboat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. 257

U. S. at 153, 45 S. Ct. at 285.

What is surprising is that generally the government has taken Chambers as heralding the start of a new exception, namely that probable cause alone is sufficient and that automobiles provide a per se exigency rule. The facts of Chambers do not support such a proposition, the Court taking considerable pains in Chambers to point out it was not setting such a rule by citing Chimel, supra, and by stating at page 50-51 the following:

> "Neither Carroll, supra, nor other cases in this court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often foreseeable; moreover, the opportunity to search is fleeting since a car is readily moveable. When this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant for

whatever period is necessary to obtain a warrant for the search.

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is moveable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." (emphasis added)

Factually the case at bar could not be more different than Chambers insofar as exigency is concerned. In Chambers two officers chased and stopped armed robbers, arresting them in the car on a dark night when the court noted that there was proper concern for the safety of the officers

were a search to have taken place at the scene. With two officers and two defendants the drain of manpower of dispatching one to secure a warrant would have been great. The risk to the remaining officer terribly increased. There was no opportunity to secure a warrant in advance of the seizure of the moving fleeing vehicle. All to the contrary in the case at bar, where the truck was locked and parked at the police annex, the keys were in the hands of the police and the defendants under arrest on other charges.

There remains two recent cases to be discussed: Cardwell v. Lewis, 417 U. S. 583 (1974) and Texas v. White, 423 U. S. 67, 96 S. Ct. 304 (1075). In Cardwell, the court took pains to state that nothing was taken from the "interior" but only the "exterior". (emphasis in opinion as to both) And, a car owner has no expectation of privacy as to the exterior of his

vehicle parked on a public street. In footnote 8 the court stated: "Again, we are not confronted with any issue as to the propriety of a search of a car's interior." Then followed a quotation from Chambers supporting the need for a warrant absent exigent circumstances. The court's limitation to a holding dealing with a search of the exterior of a car, i. e., a portion open to public view and the emphasized note that this in no way alters the rule as to interior searches makes citation of this case inapposite.

Texas v. White, supra, is also inapposite. In Texas v. White, we have a fleeing car with two defendants leaving the scene of the crime, stopped by two officers, who note that the defendants exactly fit the description of the perpetrators of the crimes. One of the defendants while in the car makes a "furtive gesture" and both are arrested on the open highway.

There was probable cause to arrest, a moving fleeing vehicle, only two officers on the scene with two defendants and the same kind of exigency as in Chambers.

The following analysis of the state of the law by the First, DC and 9th Circuits which should resolve the matter of whether exigent circumstances are required despite the presence of probable cause in order to sustain a warrantless car search. The bottom line is that both are required. In United States v. Robinson, 533 F. 2d 578 (footnote) DC Cir. 1976) the court stated that it believed Texas v. White did not abrogate the need to show exigent circumstances before dispensing with a warrant despite probable cause. What is most important is that the court noted its disagreement with a First Circuit Court of Appeals holding which seemed to suggest that with

Texas v. White, there was no longer the need to show exigency. Following this discussion in Robinson, the First Circuit reconsidered its earlier stated position and adopted the DC and Ninth Circuits analysis of the state of the law as to the need for showing exigency despite probable cause in order to conduct a warrantless car search. See United States v. Farnkoff, 535 F. 2d 661 at 665-666.

The court in Farnkoff stated:

> "We noted in our recent decision in Haefeli v. Chernoff, 526 F. 2d 1314, 1318 n. 9 (1st Cir. 1975), that the Supreme Court in Texas v. White, 423 U. S. 67, 96 S. Ct. 304, 46 L. Ed. 2d 209, 44 U.S.L.W. 3327, (1975) did not discuss the issue of exigency even though the state court had emphasized the absence of exigent circumstances. Nevertheless we are reluctant to impute to the Supreme Court an intention to overrule sub silentio the requirement of exigency. We assume that if a Supreme Court majority intends to institute such a rule, and to depart from its prior approach, it will do so by express pronouncement

> to all concerned. United States v. Robinson, 533 F. 2d 578, 18 Crim. L. Rep. 2534 (DC Cir. 1976). But see id. at 586, 18 Crim. L. Rep. at 2535 (concurring opinion of Robb, Tamm and Wilkey, JJ.) See also United States v. McClain, 531 F. 2d 431 (9th Cir. 1976) (a post White decision still recognizing the exigency requirement.) (Underlining added)

See also Robinson, supra; McClain, supra, to the very same effect.

Federal Constitutional law defines warrantless searches as "per se" unreasonable. The Carroll doctrine sets out one very narrow exception when it is not practicable to obtain a warrant. Under Carroll and its progeny, "exigent circumstances" must be found before the exception will apply. In the instant case the following facts demonstrate clearly the almost total lack of exigent circumstances.

1. The car was not a moving vehicle; rather, it was locked, seized and parked at the police annex and the police

already had the keys.

2. There was concededly no danger to the many officers as they stood around the locked vehicle, in their own baliwick.

3. There was no fear the defendants were armed or that a weapon was in the vehicle.

4. No proof was offered that either the district attroney or a judge was unavailable. Indeed the proof shows a Judge Falgout was available, since a warrant was in fact obtained one hour and 21 minutes after the initial arrest.

5. To dispatch one agent to the judge would not have unreasonable drained manpower exposing the vehicle to the risk of vandals or the loss of evidence. There was no showing that insufficient officers available to "guard" the vehicle. In fact any number of officers were present that night at the annex.

6. The vehicle was not searched as part of any inventory procedure incidental to forfeiture. This was never even contested.

7. The search was not limited to the exterior of the vehicle.

8. There was no claim the officers feared any armed accomplices.

9. The occupants were in custody on marijuana possession and reckless driving charges and had not even been processed on those charges by the time a warrant was obtained.

10. There was in short, no urgency which justified bypassing the warrant requirement. Without a showing of urgency there were no exigent circumstances and thus, despite the possible existence of probable cause, the search must fail. This fact situation presents the classic case in which to go for a warrant. The Louisiana

cases are in complete accord.

C. The Louisiana Automobile Warrantless Search Doctrine

The Louisiana Supreme Court's analysis of Automobile searches starts with the previously cited language in Chambers, supra, that:

> "The rationale of the automobile exception is that 'the circumstances which furnish probable cause to search a particular' auto for particular articles are most often unforeseeable; moreover, the opportunity for search is fleeting ... Chambers v. Maroney, 399 U. S. 42, 50, 90 S. Ct. (1975), 1981"; State v. Massey, 310 So. 2d 557, at 560 (1975); State v. Hearn, 340 So. 2d 1365 at 1368 (1976); State v. Lain, 347 So. 2d 167, 170 (1977); State in the Interest of Wagster, 348 So. 2d 751 at 752 (1st Cir. 1977).

As this Court is aware "probable cause" alone only provides grounds for the officer to seek a search warrant. The "Exigent Circumstances" and the "fleeting opportunity" must be present to search without a warrant. See Johnson v. United

States, 68 S. Ct. 367, 333 U. S. 10 (1948).

"Exigent circumstances justifies the warrantless search of an automobile stopped on the highway where there is probable cause because the car is 'movable', the occupants are alerted, and the car's contents may never be obtained; the opportunity to search is fleeting ..." (Emphasis supplied by the United States Supreme Court), State v. Massey, 310 So. 2d 557 at 560 (1975) quoting Chambers, supra.

Massey states the Louisiana rule most succinctly as follows:

> "For a warrantless search of an automobile to be constitutionally valid, there must exist probable cause to search the vehicle and exigent circumstances which render impracticable the application for a warrant." State v. Massey, 310 So. 2d 557, at 559-560. (emphasis within)

First then, there must be probable cause to search. This issue is discussed

in the warrant search section infra.

Assuming for the purpose of argument that probable cause does exist, the next issue is whether there are sufficient "exigent circumstances" to justify a warrantless search (State v. Massey, supra, at 560).*

In the instant case, the blue truck was stopped and its driver directed to proceed to the Sheriff's Annex where he was arrested. (Cantrelle, T. 739, ls. 17-26; T. 741, ls. 6-8). At the annex the defendants were arrested for reckless driving and bond was set at $100. (Falgout, T. 506, ls. 6-12)

For this argument, it is assumed,

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*However, the existence of articulated probable cause is the standard which determines the correctness of a search pursuant to a search warrant not the propriety of a warrantless search. (Massey at 560 - emphasis within)

Deputy Camptrelle saw green vegetable matter he suspected of being marijuana on the tailgate.

This sighting and possibly a later confirmation at the Sheriff's annex (Cantrelle affidavit for search warrant) led to the arrest of Thomas Tighe and Kenneth Kaercher for the simple possession of marijuana shortly after they arrived at the annex. (Cantrelle affidavit and Baughamer, T. 830, ls. 7-15, although there is much conflict on this point).

While Ken Kaercher and Thomas Tighe were in custdoy being booked on the reckless driving and simple possession charges, the "first" warrantless search of the truck was conducted.

The Automobile Exception is an attempt to resolve the conflict between an inherent Freedom of Movement and the

rights against unreasonable searches guaranteed under the Fourth Amendment. 87 Harvard Law Review 835 (1974).

Based on this analysis, then, the question is whether Tighe and Kaercher could have gone on their way in the truck that night but for the time it would take a "neutral magistrate" to review and approve a search warrant.

Their arrest on the reckless driving charge and on the simple possession of marijuana charges made a stay of a day or two probable. Certainly, they would have to wait through the next morning. Most certainly a stay of no longer than the hour and 21 minutes was necessary to obtain the warrant. Tighe and Kaercher were advised that a warrant was being obtained at the time of their arrest on possession charges. (Cantrelle affidavit). There is no

question that there was sufficient time to obtain a warrant.

The Louisiana Supreme Court has stated many times that the automobile exception is allowed only where the securing of a warrant is impracticable. See State v. Jones, 315 So. 2d 270 at 272-3 (1975); State v. Massey, 310 So. 2d 557 at 559 (1975); State v. Hearn, 340 So. 2d 1365 at 1368 (1976); State in the Interest of Wagster, 348 So. 2d 751 at 752 (1977); State v. Lain, 347 So. 2d 167 at 170 (1977); State v. Williams, 347 So. 2d 231 at 234 (1977).

The various arrests, searches, and seizures described above occurred during the late night hours of Friday, April 22, 1977, and the early morning hours of Saturday, April 23, 1977. The judgment overruling the motion to suppress was signed January 3, 1978, and the judge's

formal per curiam was prepared, filed, and furnished to defense counsel on April 6, 1978. Sometime prior to the decision on the motion to suppress, the Louisiana Supreme Court began to clarify existing Federal Constitutional Law with respect to burden of proof in warrantless searches. In any event, the Louisiana Supreme Court handed down the landmark decision in State v. Parker, 355 So. 2d 900 (La. 1978), which clearly establishes not only the dual requirement of probable cause and exigent circumstances for a warrantless search, but which also rejects the contention that the "plain view" doctrine authorizes an unreasonable seizure under the Fourth Amendment of the United States Constitution and Article 1, Section 5 of the Louisiana Constitution of 1974.

The Louisiana Supreme Court on July 1, 1977, made clear in State v. Lain, 347

So. 2d 167 (La. 1977) that the prevailing federal presumption was made applicable to the state that warrantless searches are "per se unreasonable" unless they fall within a limited number of well delineated exceptions to the warrant requirement. On December 19, 1977, the Louisiana Supreme Court fixed the burden of proof on a warrantless search upon the state in the case of State v. Franklin, 353 So. 2d 1315 (1977) in which it held:

> " ... once the defendant makes the initial showing at a Motion to Suppress hearing that a warrantless search occurred, the burden of proof shifts to the state to affirmatively show that the search is justified under one of the narrow exceptions to the rule requiring a search warrant." State v. Franklin, 353 So. 2d 1315, 1318 (1977).

Both the Franklin and Lain cases were approvingly quoted by the Louisiana Supreme Court in an arrest (rather than search) case in State v. Aguillard, 357

So. 2d 535 (La. 1978), in which the court stated:

> "In our recent decision in State v. Franklin, 353 So. 2d 1315 (La. 1977), we related that a warrantless search and seizure is presumed to be unreasonable, and thereby violative of both federal and state constitutions, unless the state meets its burden of proving that the search was justified under one of the narrow exceptions to the rule requiring a search warrant. As also stated in State v. Lain, 347 So. 2d 167, 170 (La. 1977): 'It is clear that under the Fourth Amendment to the United States Constitution Article 1, §5, a warrantless search is "per se unreasonable" unless it falls within a limited number of well delineated exceptions to the warrant requirement.'" (State v. Aguillard, 357 So. 2d 535, 537 (La. 1978).

Thus, with respect to the warrantless search of the truck the state has the burden of proof and the warrantless search is "per se unreasonable" unless it can be shown to be within one of the narrow exceptions to the federal and state constitutional rules requiring search warrants. The exception most discussed

in this case is the exception for searches of vehicles on the basis of probable cause and exigent circumstances. Not only is the state's brief scanty with respect to the issue of probable cause, it is near non-existent with respect to discussion of exigent circumstances. At best it makes a reference to the trial judge's per curiam and then after discussing a non-existent broccoli merchant, comes to the bald and unsupported conclusion that:

> "Exhibit circumstances are present, Kaercher and Tighe can leave and be gone and the search proves that there is nothing in their vehicle." See state's brief, p. 9.

Nothing is further from the true facts. One of the defendants, Thomas W. Tighe, was under three separate arrests. The other defendant, Kenneth B. Kaercher, was under two separate arrests, one of which at least was illegal. The officers

had, in fact, taken physical control and custody of the truck. The defendants were not about to be able to leave.

The law enforcement officers and after them, the attorneys for the state and the trial judge, were under the mistaken view that (1) the observation of the officers of the vegetation near the tailgate supplied probable cause and (2) that the "plain view" doctrine was in itself an exception to the requirement for a search warrant. Further, they mistakenly concluded either that a search could be made on the basis of probable cause standing alone or incorrectly concluded that exigent circumstances existed. The contrary, however, has been established by State v. Parker, supra.

In State v. Parker, supra, a police officer observed an unoccupied van in a commercial area during late night and

early morning hours. The officer decided "to see if there was anyone in it, any type of letter or anything that might show the name for possible identification." The officer shined his flashlight in the vehicle and observed a plastic bag protruding from under the seat which he thought contained marijuana. Based on this "plain view" observation, the officer opened the door to the vehicle on the driver's side, examined the package more closely, and then removed it from the van. He made no attempt to obtain a search warrant because he was under the mistaken view that anything in plain view was subject to seizure.

In suppressing the seized material, the Louisiana Supreme Court in State v. Parker, said:

> "Strictly speaking, 'plain view' is not an exception to the requirement for search warrants. Collidge v. New Hampshire, 403 U. S. 443,

91 S. Ct. 2022, 20 L. Ed. 2d 564 (1971); State v. Fearn, 345 So. 2d 468 (La. 1977). A warrantless seizure of material in 'plain view' would be an unreasonable seizure under the Fourth Amendment of the United States Constitution and Article 1, §5 of the Louisiana Constitution of 1974, unless made with probable cause and exigent circumstances, or incident to a lawful arrest while making a genuine inventory."

* * *

"It is axiomatic that, absent one of the well delineated exceptions, a warrantless search or seizure is, in itself, unreasonable under the Fourth Amendment of the United States Constitution and Article 1, §5 of the Louisiana Constitution of 1974. Coolidge v. New Hampshire, supra; Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Lain, 347 So. 2d 167 (La. 1977); State v. Fearn, supra.

All to often, lawyers and courts alike attribute greater importance to the 'plain view' doctrine than it deserves; it is easy to call it an 'exception' but it is not an exception to the requirement that a search or seizure must be supported by a warrant issued by a magistrate upon a finding of probable cause.

Plain view serves to provide a means of securing probable cause, and, absent the applicability of one of the true exceptions to the warrant requirements, nothing more."

* * *

"From the cases we may deduce the following. When an officer inadvertently observes evidence of a crime from a vantage point that does not intrude upon a protected area or when that protected area is entered with prior justification, there is no violation of the search warrant rule because there has been no 'search'. See also State v. Bourg, 332 So. 2d 235 (La. 1976); State v. Thomas, 310 So. 2d 517 (La. 1975); State v. Terracina, 309 So. 2d 271 (La. 1975). This does not, however, mean that the officer may, without more, seize the evidence. If the evidence is itself within a protected area, the officer may not enter that area to effect the seizure without first obtaining a warrant, absent exigent circumstances or another exception to the warrant requirement." State v. Parker, 355 So. 2d 900, (La. 1978).

In this connection, it should be pointed out that the Louisiana Supreme Court has recently held that upon arrest for a traffic violation, a motorist

vehicle cannot, constitutionally, solely because of the traffic arrest, become the subject of an unlimited criminal investigation in order, if possible to charge the motorist with more serious crimes. See Louisiana v. Rome, 354 So. 2d 504, 506 (1978); State v. Gaut, 357 So. 2d 513 (1978); and State v. Schmidt, 353 So. 2d 1044 (1978).

The requirements for exigent circumstances in addition to probable cause have been held applicable to warrantless searches of an apartment (State v. Jones, 315 So. 2d 270) and a moving automobile (State v. Colvin, 353 So. 2d 1043). In State v. Jones, supra, the Louisiana Supreme Court, after rejecting an inadequate probable cause from the officer's

smelling of non-existent marijuana smoke, held that the absence of exigent circumstances alone would have precluded the warrantless search of the apartment even had there been probable cause. In State v. Colvin, supra, the Louisiana Supreme Court reviewed recent cases in which it had upheld warrantless searches of automobiles and demonstrated the existence of exigent circumstances in those particular cases. In the Colvin case, however, the Louisiana Supreme Court reversed the conviction and ordered the evidence suppressed on the ground that there was no exigent circumstances although probable cause did exist. Thus, even a moving or movable automobile standing alone does not supply exigent circumstances.

WITH REGARD TO VALIDITY OF SEARCH WARRANT.

The search warrant is invalid since:

1. The affidavit does not state facts upon which a magistrate can base a finding of probable cause, and,

2. The issuing magistrate was purposely and intentionally deceived by the Sheriff's Department.

(1) No Probable Cause to Search Recited in Affidavit.

Article 162 of the Louisiana Code of Criminal Procedures sets the standard for a valid warrant as follows:

> "A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant."

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their person, houses, papers,

> and affects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but among probable cause, supported by oath or affirmation, and particulary describing the place to be searched, and the persons or things to be seized."

Measured against Article 162 and its Constitutional basis, Article 1, Section 5, of the Louisiana Constitution and the Fourth Amendment of the United States Constitution, the affidavit in this case can not stand. The affidavit requesting a search for marijuana inside the truck states that after a traffic stop, "I observed what appeared to be green vegatable matter on the tailgate..." and later, "I then returned to the vehicle and did notice more closely of the green matter on the tailgate and at that time retrieved some of the green vegtable matter from the tailgate. After obtaining this green matter, I proceeded to complete a search warrant form..."

This is not sufficient. There must be facts on which a neutral magistrate can find probable cause. Even if the affidavit said "what appeared to be marijuana" it would be a mere prohibited suspicion. As it is, there isn't even the bald faced allegation of what kind of plant material this green matter is.

Simply put, a suspicion of contraband is not enough to sustain a valid warrant. In State v. Paciera, 290 So 2d 681 (La. 1974), Justice Tate outlines the law as follows:

> "Under our jurisprudence, a search warrant may not be issued upon an affidavit reciting nothing more than the affiant has reasonable cause to suspect that the object of the search is in the premises. State vs. Wells, 253 La. 925, 221 So.2d 50 (1969). The affidavit must recite facts establishing to the satisfaction of the judge, not the affiant, that probable cause exists for issuanace of the search warrant. State v. Holmes, 254 La. 501, 225 So.2d 1 (1969); State v. Wells, cited above. If a search warrant is illegally issued by

> virtue of an insufficient affidavit, the eviedence thereby seized is inadmissable in a criminal prosecution. State v. Holmes and State v. Wells, cited above; see Professor Dale Bennett, 30 La.L.Rev. 309-10 (1969)." State v. Paciera, 290 So.2d 681 (La.1974) at 683.

The affiant's opinion, suspicion or belief is not enough, as Judge Marcus has obseved in State v. Flood, 301 So.2d 637 (1974):

> "It is well settled that the affidavit must recite facts establishing to the satisfaction of the judge not the affiant, that probable cause exists for the issuance of the search warrant. State v. Paciera, 290 So. 2d 681 (La.1974); State v. Holmes, 254 La. 501, 225 So. 2d 1 (*1969); State v. Wells, 253 La. 925, 221 So. 2d 50 (1969).
>
> "The factual information which is the foundation for the determination of probable cause must be contained in the affidavit. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Article 162 C.Cr.P. Mere suspicion or belief is not sufficient. Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933); Aguilar v. Texas; State v. Flood, 301 So.2d 637 (1974), at 641.

There is no information in the warrant

that would lead a reasonable man to conclude that marijuana was in the rear of the truck. Four a. m. is not unusual for truck traffic to and from the packing and supply houses down the bayou. No one testified it was. The traffic charge was essentially being unaware of a special circumstance. No one alleged speeding. The driver was out of state, but did not resist arrest, made no furtive gestures and complied with all requests of the police but for opening the tailgate. There was no field test confirming the green matter as marijuana. There was no statement of experience of the officer in recognizing marijuana. There was no admission on defendant's part. The only reason given for the warrant was that some undetermined member of the plant kingdom was thought to be on the tailgate. If this warrant is valid every jar of parsley in any grandmother's spice cabinet is subject to

seizure. The affidavit is insufficient. The evidence is inadmissable.

(2) The Warranted Search Was Invalid in that the Magistrate Was Intentionally Deceived

The Fourth Amendment of the United States Constitution would be rendered meaningless if the State be allowed to rectify and sanctify antecedent, invalid and unreasonable searches by subsequent procedures.

An analysis of the transcript of the hearing in question shows undisputedly that State agent Lirette participated in the warrantless search which search was conducted prior to the application for a search warrant presented to Judge Falgout. Additionally, the undisputed testimony adduced at the hearing establishes that state agent Lirette had actual knowledge and in fact was present when the suspected marijuana was field tested.

Conspiciously and inexplicibly absent in the affidavit presented to Judge Falgout was any mention whatseever or any implication whatsoever that the State prior to their application to Falgout or in their application to Falgout for a warrant to search the truck in question, had not only searched the truck in question already, absent a warrant, but had conducted no less than three qualitative analysis, i.e., so-called "field tests" of the suspected marijuana inside said truck.

Such an unjustified reprehensible misrepresentation by omission to Judge Falgout constitutes a prostitution of the rudimentary demands of good faith and fair play demanded by our law enforcement officers through our Constitution and way of life.

Whether or not Cantrelle actually

knew of the prior search is irrelevant to the appellants' position that the State perpertrated a fraud upon Judge Falgout. There is undisputed evidence that clearly reveals by virtue of state action (i.e., Lirette's participation in formulating and typing the application to Falgout), that the state purposefully and intentionally deceived Judge Falgout as to the present status of the investigation in question, at the time the State applied to Judge Falgout for the search warrant.

The courts have spoken directly to such reprehensible conduct as exists in the subject case. In this regard see United States v. Thomas, 489 F.2d 664, (5th Cir. 1973), specifically at 669, to-wit:

> "Therefore, we hold that affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing

of probable cause;..."

Further amplifying their above holding the Thomas court above at 671 states:

> "Without further citation of authority we are convinced that there would be sufficient basis for invalidating a search warrant if the error was intentional, even though immaterial to the showing of probable cause." In fact, a warrant issued following an intentional misstatement of fact by an affiant agent would present the clearest case for suppression...."
>
> "Invalidating warrants pursuant to intentional misrepresentations by government agents is a logical corollary of the deterrents philosophy underlying the exculsionary rule."

Where state agents knowingly and purposefully intentionally deceive the courts, the administration of justice in contemplation of our system of government and Constitution demands that the integrity of the courts be maintained.

As has been said, mere admonitions

to transgressing state agents rarely suffice, the court must protect its integrity by invalidating the warrant.

In United States v. Brouillette 478 F.2d 1171 (5th Cir.) it was said:

> "One of the prerequisities for issuing a search warrant is the requirment that probable cause be established by factual information given a neutral and detached magistrate. In this case the agents set forth the information sufficient only to believe that a state crime was being committed. Citing it with approval its own decision in Thomas v. United States, 242 F.Supp. 191 (S.D.N.Y. 1965) and United States v. Ventresca, 380 U.S. 102 the court stated recital of some of the underlying circumstances in the affidavit is essential, if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." United States vs. Brouillette, 478 F.2d 1171 (5th Cir.) at 1175.

In Thomas the affidavit failed to set forth any of the underlying circumstances by which the magistrate could have concluded that a Federal crime was being committed. Clearly mere conclusions

without underlying circumstances are insufficient to allow the magistrate to determine independently, as he must, that a crime has been or is being committed and, in the case of federal warrants, that a federal crime is extant.

In Brouillette the affidavit again failed to provide underlying circumstances upon which to conclude anything more than state crime was being investigated. However, the warrant itself did set forth the specific Federal Statute from which, under Ventresca, the magistrate could have gleaned what crime was being investigated. Nevertheless, the Fifth Circuit Court of Appeals held that even this addition did not provide underlying circumstances sufficient to allow the magistrate to form a probable cause belief that a federal crime had been or was being committed. Thus, the sine qua non for issuance of the warr-

ants in Thomasand Brouillette was underlying facts to support a conclusion that a crime was involved. In the case at bar the sine qua non was the underlying facts for the conclusion that the green vegatable matter on the outside of the truck was marijuana. This is not present in the affidavit. There was not a single fact stated in the affidavit which would have provided the basis upon which the magistrate could have inferred how the affiant reached his conclusion. See also State v. Williams, 338 So.2d 1365 (1976), Louisiana Code of Criminal Procedure Article 162; State v. Chaffin, 324 So.2d 369 (1975), State v. Luneau,323 So.2d 770 (1975); State v. Vince, 405 So.2d 916 (1974); Louisiana Constitution Article 1, paragraph 5; State v. Paciera, supra; United States v. Hill, 500 F.2d 315 (1974); State v. Linkletter, 286 So.2d 321(1973).

In summary, there is no support in Federal or State law for a valid warrant without facts from which a magistrate can draw his own conclusion of probable cause. Here no such facts are presented even if one substitutes marijuana for every green matter alleged. Additionally, and perhaps ultimately more important,our system of justice should have no place for those who purposely deceive a magistrate. Due process of law itself is threatened by such misconduct.

RULING IN THE LOUISIANA SUPREME COURT:

The Louisiana Supreme Court in its consideration of this case concluded that the language "green vegetable matter" is synonymous with the word "marijuana" and upheld the validity of the search warrant. It did not determine the issue of "bad faith" resulting from the failure of law enforcement officers to disclose the prior

warrantless search of the vehicle to the magistrate who issued the search warrant and declined to consider and pass upon defendants contention that the physical evidence was discovered as a result of a prior warrantless search which was unconstitutional for the reason, among others, that there was an absence of exigent circumstances.

In reaching its conclusion in this case, the Louisiana Supreme Court has done principally three things:

1. determined that the term "green vegetable matter" (inferentially, "green matter") is snynonymous with the word "marijuana" when it is used in law enforcement and judicial proceedings,

2. refused to adjudicate the issue of law enforcement "bad faith" resulting from the failure of law enforcement officers (in particular of Deputy Lirette, the deputy assisting in preparing the affidavit for the search warrant) to disclose to the judge issuing the search the fact that a prior warrantless search had been conducted

of defendants' vehicle, and

3. declined to consider defendants-appellants' argument that an unconstitutional warrantless search was conducted prior to the search pursuant to the warrant.

The cornerstone of the Louisiana Supreme Court's holding in this case is found in the following language:

> "We agree with the State that the term, 'green vegetable matter," is synonymous with the word, 'marijuana,' when it is used in law enforcement and judicial proceedings."

Therein lies the error in the Louisiana Supreme Court's opinion. "Green vegetable matter" is not synonymous with "marijuana" when used in the English language or in judicial proceedings. Any attempt to misconstrue the term "green vegetable matter" and contort it into the word "marijuana" seriously offends the Due Process and equal protection provisions of the United States Constitution, Fourteenth Amendment. Furthermore, the fact that a search warrant

was issued in no way adds to the validity of an affidavit constitutionally insufficient and inadequate for the issuanace of the warrant. Therefore, issuance of the search warrant in no way bolsters the conclusion that the sighting of green vegetable material is understood to be suspected marijuana.

Although courts have authority to interpret words, they may not re-define them. No dictionary or thesaurus will list "green vegetalbe matter" and "marijuana" as synonyms. No legislative acts defines "green vegetable matter" as "marijuana". In fact, quite to the contrary, marijuana is defined as follows:

> "(22) 'Marijuana' means all parts of plants of the Genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plants, fiber produced from such stalks, oil or

> cake from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." La. R.S. Titlle 14, Section 961, Sub-paragraph (22).

The affidavit requesting a search of the truck, in its pertinent provision, states "I observed what appeared to be green vegetable matter on the tailgate..." and later "I then returned to the vehicle and did notice more closely of the green matter on the tailgate and at that time retrieved some of the green vegetable matter from the tailgate. After obtaining this green matter, I proceeded to complete a search warrant from..."

This is not sufficient. There must be facts on which a neutral magistrate can find probable cause. There is not even a baldfaced allegation of what kind of plant material the green matter is.

The Louisiana Supreme Court cites State v. Segers, 355 So. 2d 238 (La. 1978) as authority for upholding the affidavit in the instant case. The differences between the affidavit in the Segers case and the affidavit in the instant case are drastic. For example, the Kaercher and Tighe case affidavit refers to "green vegetable matter" while the Segers affidavit refers to "marijuana gleanings". Further, the affidavit in Segers stated that the outside of the aircraft and Ford U-Haul truck "smells strongly of marijuana" while the Kaercher and Tighe affidavit has absolutely no allegation with respect to such an oror. Finally, the Segers affidavit contains the affirmative allegation that affiants believed the vehicles and planes contained marijuana while there was no such allegation of belief in the Kaercher and Tighe affidavit. Thus, Segers

had an affirmative allegation of belief that marijuana was hidden in the described vehicles, and showed that this belief was based upon observation of "marijuana gleanings" and the detection "of the odor of marijuana" in the area. See State v. Segers, 355 So. 2d 238, 241 (La. 1978). That is a far cry from stating that "green vegetable matter" is synonymous with "marijuana".

The Louisiana Supreme Court avoided the issue of the intentional deception of the magistrate by directing its attention only to the conduct of Deputy Cantrelle and in such a manner placed him in a sterile cocoon by saying there is no showing that Deputy Lirette who assisted him in typing the application for search warrant revealed to Deputy Cantrelle the prior warrantless search. In so doing, the Court focused its attention on the wrong target of misconduct. It is Deputy Lirette

(as well as the other officers) who concealed the prior unconstitutional warrantless search of the vehicle. Deputy Lirette, one of the officers who in fact participated in or observed the warrantless search of the vehicle and had positive affirmative knowledge of that fact, assisted in preparation of the document which served as the basis for the search warrant by typing it and therefore, knew its entire contents. He knew, as a law enforcement officer, that the judge would be deceived by omission of the fact of the prior warrantless search.

The State of Louisiana is accountable for the misconduct of any or all of its officers in connection with the search and not merely the one who presents the affidavit to the judge who reviews it for its sufficiency. Otherwise, law enforcement officers could conduct as many illegal and unconstitutional searches as they de-

sired and afterwards insulate themselves from the effect of their conduct by partitioning themsleves into groups of those acting in "good faith" and those acting in "bad faith". In reality, ALL of the officers working on this case had an affirmative duty to disclose to the Judge the prior warrantless search. Deputy Lirette breached that affirmative duty when he knowingly permitted the affidavit to be prepared in such a manner as to omit a disclosure of the prior warrantless search.

The Louisiana Supreme Court, in its opinion, stated:

> "While the actions of fellow officers in conducting a warrantless search might be viewed as reprehensible if undertaken under circumstances where there is no legal justification for their intrusion, that issue has no bearing on our determination that the affiant here validly obtained a warrant to conduct a search of the truck."

* * *

> "Having determined the legality of the search conducted pursuant to the warrant, we need not consider defendants' arguments that the trial court erred in determining the warrantless search conducted by Boughamer, Doucet and Lirette was valid, due to the existence of exigent circumstances at the time Deputy Cantrelle had both truck and driver detained on the shoulder of Highway 1."

This is of importance. Unquestionably, the warrantless search of the vehicle was conducted prior to the issuance of the search warrant.

It is readily apparent that the defendant, Thomas W. Tighe, had been arrested three times before the warrantless search of the truck or the seizure of a sample from within the contents of the truck.

There is no way that the prosecution can contend that the marijuana was obtained as a result of conducting a search pursuant to a warrant. They had already searched for and observed the marijuana

in the truck before the warrant ever came into being. The law enforcement officers simply could not unlearn information that they had learned. How does a law enforcement officer unsearch a vehicle? Does he then go to a judge and get a search warrant for a second search and therefore unsearch the prior search? The issue of the unconstitutionality of the warrantless search of the vehicle must be judicially determined in favor of defendants for the reason that it was the first search and therefore the search by which the law enforcement officers learned of the contents of the vehicle.

By what authority can the state possibly contend factually that it introduced only the material found pursuant to the search warrant and not the material found pursuant to the warrantless search?

Defendants-appellants contend that the Louisiana Suprmee Court should have considered and ruled upon the issue of the warrantless search giving attention to all of the authorities cited and particularly to the United States Constitution's Fourth and Fourteenth Amendments, Article 1, Section 5, of the Louisiana Constitution as well as the pronouncements of that Court in State v. Parker, 355 So. 2d 900 (La. 1978), State v. Hargiss, 288 So. 2d 633 (1974), State v. Franklin, 353 So. 2d 1315 (La. 1978), State v. Lane, 347 So. 2d 167 (La. 1977).

CONCLUSION

For the foregoing reasons, it is urged that the Louisiana Supreme Court erred in determining defendants' Fourth Amendment rights when it held that "green vegetable material" is a synonym in judicial proceedings for "marijuana" and further, that the Louisiana Supreme Court

should have heard and determined the issue of the prior warrantless search of the vehicle and held it to be an unconstitutional search barring the admissibility into evidence of that contraband found as a result of such unlawful and impermissible conduct.

Respectfully submitted,

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C E R T I F I C A T E

I certify that a copy of the foreoing application has been served upon opposing counsel: William J. Guste, Jr., Attorney General, State of Louisiana, State Capitol, Baton Rouge, Louisiana; Frances Dugas, District Attorney, 17th Judicial District, Lafourche Parish Courthouse, Thibodaux, Louisiana; John J. Erny, Jr., Assistant District Attorney, 17th Judicial District, Lafourche Parish Courthouse, Thibodaux, Louisiana.

Alexandria, Louisiana, December 31st, 1978.

Camille F. Gravel, Jr.
CAMILLE F. GRAVEL, JR.

APPENDIX "A"

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362 So.2d 754

STATE of Louisiana

v.

Kenneth B. KAERCHER

STATE of Louisiana

v.

Thomas W. TIGHE

Nos. 61674, 61675.

Supreme Court of Louisiana

Sept. 5, 1978

Rehearing Denied Oct. 5, 1978

CALOGERO, Justice.

Defendants were charged by bills of information with possession of marijuana with intent to distribute, a violation of La. R.S. 40:966. A pre-trial motion to suppress the 12,600 pounds of marijuana, urging that the seizure was warrantless, without the requisite exigent circum-

stances, was denied after a lengthy hearing. The trial court permitted the defendants to enter guilty pleas to the crime charged with reservation of the right to appeal the ruling on the motion to suppress, a precedure approved in State v. Crosby, 338 So.2d 584(La.1976). Upon their pleas of guilty, each defendant was sentenced to serve ten years at hard labor and pay a fine of $15,000.

The trial judge's per curiam filed in the record notes that during the early morning hours of April 23, 1977 a major fire which destroyed the Safari Club in Galliano, Lafourche Parish, was in progress. When firefighting efforts commenced, Louisiana Highway No. 1, running in front of the club, was blocked. At about 3:55 A.M., most of the fire was out, but hot spots in the rubble were causing flare-ups and firefighters were responding

to the problem. There were at least three fire engines still at the scene, pumping water through hoses placed in Bayou Lafourche across Highway 1 for fighting the sporadic flare-ups. Partial road blocks on Highway 1 on either side of the Safari Club were still in effect and fire and police units with emergency lights activated were at the scene. Large numbers of people, some walking on or near the roadway, were still present. Major Doucet of the Lafourche Sheriff's Office observed a blue 1974 GMC truck drive through this congested area over fire hoses at approximately 45 miles per hour, the speed posted for travel in the area under normal circumstances. Doucet instructed Deputy Cantrelle to pursue the truck and Cantrelle overtook the vehicle at a point about one mile north of the fire scene. The truck pulled over on the shoulder, the Deputy

Cantrelle parked behind the truck and emerged from his unit. As Cantrelle approached the truck the driver also exited his vehicle and walked to the truck's rear to meet the deputy. Cantrelle asked the driver to produce his license and the driver complied. Cantrelle thereby learned that the driver was Thomas Tighe of Minnesota. The deputy advised Tighe that he was under arrest. At this time Cantrelle observed mariguana gleanings on the back of the truck and requested permission to open the truck. Such permission was denied. Deputy Cantrelle directed Tighe to drive the truck to the Galliano annex of the Sheriff's Office, where both Tighe and his passenger, Kaercher, were apprised that they were under arrest and given Miranda warnings. After escorting the defendants into the annex, Cantrelle, accompanied by Major Doucet and Dectective Robert Boughamer, again viewed the rear of the truck;

marijuana gleanings were clearly observable on the truck's tailgate and partially sticking out from under the rear door. A strong marijuana order was detected. Boughamer took samples of the gleanings from the tailgate, subjected them to field testing and obtained positive results. Cantrelle had commenced preparation of the affidavit which he planned to submit in support of his application for a search warrant for the truck. After the field testing Boughamer, accompanied by Doucet and Deputy Lirette, returned to the rear of the truck and opened the doors, observing numerous bales of marijuana within. When Lirette returned to the annex office, he assisted Cantrelle in completing the preparation of the affidavit.[1]

1. Lirette's assistance consisted of typing Cantrelle's affidavit and aiding the less experienced officer with wording of the affidavit. Lirette made no suggestions with regard to the affidavit's substance.

Cantrelle obtained a warrant to search the truck and the search was conducted at approximately 7:00 A.M. Based on the 12,600 pounds of marijuana found in the truck, defendants were advised that they were charged with possession of marijuana with intent to distribute.

The defendants attack the search conducted pursuant to the warrant, urging that the warrant was invalidly obtained and claiming that the affidavit fails to set forth the requisite probable cause upon which the warrant's issuance must be based. We first examine Cantrelle's affidavit which recited the following facts to determine whether it sets forth the articulated probable cause necessary to support the search warrant.

At approximately 3:55 A.M. on April 23, 1977, while Cantrelle was working traffic at the Club Safari fire site he

saw the vehicle for which permission to search was sought travelling in excess of 40 M.P.H. through the congested area. As it approached the congestion, it appeared to maintain its speed rather than slow down; it was noted that the truck maintained its rate of speed while travelling through the area. Cantrelle pursued the truck and overtook it after having travelled a distance of about a mile. The officer approached the truck and asked that the driver alight and come to the rear of the truck. The driver complied and Cantrelle asked him for his driver's license; while the driver sought to produce the license, Cantrelle, glancing at the rear of the truck, observed what appeared to be green vegatable matter on the truck's tailgate. Cantrelle did not remark upon his observation, but merely accepted the license produced, which revealed that the

driver was Tighe, a resident of Minnesota. Cantrelle informed Tighe that he was under arrest for "his offense as he proceeded through the congested area" and instructed him to proceed to the annex. At the annex Cantrelle returned to the rear of the truck and noticed more closely the green vegetable matter on the tailgate, some of which he retrieved. Cantrelle then commenced preparation of the affidavit and Tighe was informed that a warrant was being sought. The affidavit notes that the vehicle was secured in front of the annex in plain view, pending the issuance of the search warrant and exploration pursuant thereto.

Appellants protest that the affidavit's repeated references to observation of "green vegatable matter" and "green matter" fall short of a claim that marijuana was viewed. They urge that even if

the affidavit had noted observation of "what appeared to be marijuana," a mere suspicion would thereby have been related not the conrete facts which the law requires in an affidavit in support of a warrant application.

It is well established in the jurisprudence that affidavits for search warrants are tested and interpreted in a commonsense and realistic fashion. United States v. Ventresca, 380 U.S. 102,85 S.Ct. 741, 13 L.Ed.2d 684(1965); State vs Boyd 359 So.2d 931(La.1978); State vs. Segers, 355 So.2d 238(La.1978); on rehearing, 357 So.2d 1(La.1978). Construing the instant affidavit in a realistic manner, we conclude that it did set forth probable cause to search. We agree with the State that the term, "green vegatable matter," is synonymous with the work, "mariguana", when it is ued in law enforcement and judicial

proceedings. Moreover, the defense misapprehends the requirement of Article 162 of the Code of Criminal Procedure that an affidavit in support of a search warrant application set forth facts when it construes that requirement to mean that the substance viewed must have been conclusively identified or scientifically proven to be a controlled dangerous substance. The fact that the search warrant issued authorized exploration for one item only, marijuana, bolsters our conclusion that when sighting of green vegetable matter is reported by a law enforcement official, the "green vegetable matter" is understood to be suspected marijuana.

The representations set forth in the affidavit adequately supply probable cause upon which to base the issuance of a search warrant for the truck defendant

Tighe was driving. In State vs. Segers, supra, we noted that a commonsense reading of the affidavit revealed that the issuing magistrate was told of the affiants' belief that marijuana was hidden in the described vehicles, such belief being based on the observation of marijuana gleanings on the outside of the vehicles and the detection of the odor of marijuana in the area. WE held that those facts sufficiently supported a finding of probable cause.

As in the Segers case, the affiant was a law enforcement official. Realistically, when an officer seeks a search warrant based on his sighting of green vegetable matter and the magistrate construes the representations as a request to search for marijuana, the settled principle requiring that probable cause determinations be paid great difference, which mandates that resolution of doubtful cases be largely determined by the

preference accorded warrants, dictates our judicial approval of the affidavit's sufficiency. State vs. Anderson, 357 So. 2d 547(La.1978).

The appellants' claim of the insuffiiciency of the affidavit is without merit.

Appellants' argument that the search warrant was invalidly obtained is based on the claim that failure to apprise (in the affidavit) of the earlier, warrantless search constituted an unjustified and reprehensible misrepresentation by omission which requires disapproval of the warrant. The issue of affiant's knowlege of vel non of the prior search is urged to be irrelevant; because Deputy Lirette, who was present at the warrantless search, assited Deputy Cantrelle in the preparation of his affidavit by typing it, intentional and purposeful deception of the judge was wrought by means of State action.

Insofar as acquisition of the warrant was concerned, only the affiant, Deputy Cantrelle, contacted and communicated with the issuing judge. There is no representation that Cantrelle knew that a warrantless search had been conducted by fellow officers, and a review of the entire record fails to establish that there was such knowledge on Cantrelle's part. Deputy Lirette testified that he did not advise Cantrelle that the truck had been opened; Cantrelle himself stated that he only learned that the truck had been opened without a warrant after he himself had secured the search warrant.

The issue which the Court must determine is whether the search warrant was invalidly procured. The record fails to establish any deception, fraud or misrepresentation on the part of the affiant, whose representations formed the basis

for the warrant's issuance. We have determined that the contents of the affidavit were sufficient to support a finding of probable cause. While the actions of fellow officers in conducting a warrantless search might be viewed as reprehensible if undertaken under circumstances where there was no legal justification for their intrusion, that issue has no bearing on our determination that the affiant here validly obtained a warrant to conduct a search of the truck.

All of the defendants' claims relating to the search warrant lack reversible merit. The trial court did not err in denying defendants' motion to suppress.

Having determined the legality of the search conducted pursuant to the warrant, we need not consider defendants'

arguments that the trial court erred in determining that the warrantless search conducted by Boughamer, Doucet and Lirette was valid, due to the existence of exigent circumstances at the time Deputy Cantrelle had both truck and driver detained on the shoulder of Highway 1.

Decree

For the foregoing reasons, the defendants' conviction and sentences are affirmed.

AFFIRMED.

DENNIS, J., concurs

APPENDIX "B"

STATE OF LOUISIANA 17thJUDICIAL DISTRICT

VS. NO. 78617 PARISH OF LAFOURCHE

KENNETH KAERCHER STATE OF LOUISIANA

DIVISION "A"

****

JUDGEMENT ON MOTION TO SUPPRESS

****

These matters came to be heard by the Court on a Motion to Suppress Evidence filed by the defendant and the Court after hearing the pleadings, the evidence, the law and the argument of counsel rendered the following judgement:

IT IS ORDERED, ADJUDGED, AND DECREED that the motion to suppress filed by the defendant, KENNETH KAERCHER be and it is hereby overruled and dismissed.

JUDGEMENT RENDERED, READ AND SIGNED this 3rd day of January, 1978, in open

court at Thibodaux, Parish of Lafourche, State of Louisiana.

/s/ Walter I. Lanier, Jr.
WLATER I. LANIER, JR.
JUDGE, 17TH JUDICIAL
DISTRICT COURT
PARISH OF LAFOURCHE,
DIVISION "A"

APPENDIX "C"

STATE OF LOUISIANA 17TH JUDICIAL DISTRICT

VS. No. 78618 PARISH OF LAFOURCHE

THOMAS W. TIGHE STATE OF LOUISIANA

DIVISION "A"

****

JUDGEMENT ON MOTION TO SUPPRESS

****

These matters came to be heard by the Court on a Motion to Suppress Evidence filed by the defendant and the Court after hearing the pleadings, the evidence, the law and the argument of counsel rendered the following judgment:

IT IS ORDERED, ADJUDGED, AND DECREED that the motion to suppress filed by the defendant, Thomas Tighe, be and it is hereby overruled and dismissed.

JUDGEMENT RENDERED, READ AND SIGNED this 3rd day of January, 1978, in open

court at Thibodaux, Parish of Lafourche, State of Louisiana.

/s/ Walter I. Lanier, Jr.
WALTER I. LANIER, JR.
JUDGE, 17th JUDICIAL DISTRICT
COURT, PARISH OF LAFOURCHE
DIVISION "A"

APPENDIX "D"

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus NUMBER 61,674

KENNETH B. KAERCHER

STATE OF LOUISIANA

versus NUMBER 61,675

THOMAS W. TIGHE

O R D E R

Upon considering the foregoing application of petitioner-defendants-appellants herein, it is

ORDERED that all further proceedings be stayed pending the filing, consideration and disposition by the Supreme Court of the United States of the petition and application for writ of certiorari to be made by petitioners-defendants-appellants herein, provided such petition is filed in the Clerk's office of the

Supreme Court of the United States not later than ninety (90) days from the 5th day of October, 1978, the day that their application for rehearing in this case was refused by this Court.

New Orleans, Louisiana, this 5th day of October, 1978.

/s/ Joe W. Sanders,

Chief JUSTICE, SUPREME COURT OF LOUISIANA

APPENDIX "E"

AFFIDAVIT FOR SEARCH WARRANT

STATE OF LOUISIANA
PARISH OF LAFOURCHE
17TH JUDICIAL DISTRICT COURT

BEFORE ME, the undersigned Judge of the 17th Judicial District Court in and for the Parish of Lafourche, Louisiana, personally came and appeared: Deputy Gerald Cantrelle, %LAFOURCHE PARISH SHERIFF OFFICE, GALLIANO, LA., who after being first duly sworn, did depose and say: that he requests permission and authority to search a 1974 GMC Van Truck bearing 77 La 1903305.

The reasons and facts upon which this request for a search warrant is based are as follows: that at aprx 3:55 AM April 23 1977, while working traffic on La Hwy 1 at the scene of a fire at the Safari Club in Galliano, La and while firefighting and police equipment and personnel were working

to fight the fire and maintain traffic control at the scene of the fire, the above described vehicle was observed traveling in a northerly direction on La Hwy 1 and appeared to not slow for the the oncoming road congestion. That the vehicle appeared to be traveling in excess of 40 MPH. Further that as the vehicle described did approach the congested area, it was found that the vehicle did not slow and continued at the same rate of speed and did pass through the congested area at the same speed and continued going north. Upon observing this, I then got into the police unit and took up pursuit of the vehicle. I did manage to stop the vehicle at a point aprx 1 mile north of the Safari Club on La Hwy 1. I approached the vehicle and asked the driver to get out of the truck and to come to the rear of the truck and in front of the police unit.

The driver did as requested. Said driver was asked for his drivers license and as he did, X look for the drivers license, I stood near the rear of the truck. As I stood near the rear of the door of the truck, I observed what appeared to be green vegatable matter on the tailgate portion of the truck. I did not inform or ask the driver of the truck about the green matter. I did accept his drivers license and found the driver to be Thomas W. Tigeh W/M of Minnesoto. I informed the subject of his offense as he proceeded through the congested area and arrested subject. He was informed that he could drive his vehicle to the sheriff office and follow me as I drove the police unit. At the sheriff office, I had the subject park the vehicle in front of the sheriff office and then brought subject into the office. After the subject was in the office, I

then returned to the vehicle and did notice more closely of the green vegatable matter on the tailgate and at that time retrieved some of the green vegatable matter from said tailgate. After obtaining this green matter, I proceeded to complete a search warrant form for the search of the vehicle. The subject was further informed of his rights and of the charge. He was also informed that I was attempting to obtain a search warrant for the search of his vehicle. Subject was then processed and confined. The vehicle was secured in front of the sheriff office at Galliano where it was in plain view until a search warrant could be obtained.

/s/ Gerald A. Cantrelle
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME THIS 23rd DAY OF April, 1977, IN LAFOURCHE PARISH, LOUISIANA.

/s/ W. J. Falgout
JUDGE
17th Judicial District Court.
Division C.